Filed 7/17/12 In re Alyssa S. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ALYSSA S. et al., Persons Coming Under the Juvenile Court Law. TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. BARBARA H., Defendant and Appellant.	F063789 (Super. Ct. Nos. JJV062482B, JJV062482C) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Tulare County. Charlotte Wittig, Commissioner.

Michelle Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Hill, P.J., Levy, J. and Kane, J.

Barbara H. is the mother of two children, 17-year-old Alyssa S. and 13-year-old C.H., who were adjudged juvenile dependents and removed from her custody in 2008. Since that time and prior to this appeal, mother in propria persona has filed 15 notices of appeal and notices of intent to file writ petitions (Cal. Rules of Court, rule 8.452) relating to the children's dependency. Mother has not prevailed in any of these matters and our decisions in them are final.

Respondent Tulare County Health and Human Services Agency (agency) moves to declare mother a vexatious litigant. On review, we conclude mother is a vexatious litigant within the meaning of Code of Civil Procedure section 391, subdivision (b)(1)[1] and should be subject to a prefiling order (§ 391.7). The appeal is otherwise dismissed as abandoned.

PROCEDURAL AND FACTUAL HISTORY

Juvenile Court Proceedings

In January 2008, the juvenile court removed then 12-year-old Alyssa, eight-year-old C.H. and their older brother, from mother's custody because she was unable to provide for and supervise them. As a result of her neglect, the children were exhibiting behavioral problems and committing criminal acts. The children were also diagnosed with a mental disorder and a deficit in intellectual functioning. The juvenile court ordered reunification services for mother and soon after dismissed dependency

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1 All statutory references are to the Code of Civil Procedure unless otherwise indicated.

Section 391 includes multiple definitions of a vexatious litigant, including a person who: "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person …." (§ 391, subd. (b)(1).)

jurisdiction over the older brother after he was declared a ward of the juvenile court in Kern County.

Mother's prospects for reunification with Alyssa and C.H. (hereinafter "the children") hinged on her participating in therapy. She needed the therapy to understand that the children were removed because of her neglect, to understand the severity of their mental health needs, and to assist in their treatment. However, mother resisted therapy from the very beginning, by refusing to either disclose the family had any problems or meet with the therapist. By refusing treatment, mother stubbornly remained in denial and excluded herself as a participant in the children's treatment.

Mother eventually submitted to therapy and made some progress. However, the juvenile court found, at an 18-month review hearing in May 2009, that mother still posed a risk of detriment to the children. As a result, the juvenile court terminated reunification services for mother and set a hearing to select and implement a permanent plan for the children (setting order). There is no evidence in the record that mother ever made any subsequent effort towards reunification.

In October 2009, prior to the permanency planning hearing, the court suspended mother's rights to make any medical/dental, mental health and educational decisions for the children. In November 2009, the court conducted an uncontested permanency planning hearing. The court ordered a permanent plan of long-term foster care for Alyssa and C.H. with a goal of legal guardianship.

By the time of the court's first post-permanency planning review hearing in May 2010, mother had retained counsel to represent her. Mother previously had been represented by court-appointed counsel. Eleven months later, the court granted a motion to withdraw brought by mother's retained counsel. Mother apparently had not paid her attorney's fees. Mother has not since asked the court to appoint new counsel to represent her.

Meanwhile, in November 2010, at a post-permanency planning review hearing, the juvenile court set a section 366.26 hearing in March 2011, as to C.H., to determine whether legal guardianship would be a better permanent plan for him. Since Alyssa was still a runaway and her whereabouts were unknown, the court set a post-permanency planning review hearing as to Alyssa to be heard on the day scheduled for C.H.'s section 366.26 hearing.

As of this appeal, the children remain in long-term foster placements.

Appeal and Writ Proceedings

Mother in propria persona filed the pending appeal from October 2011 orders summarily denying her request that the children be returned to her custody and continuing the children's permanency plan of long-term foster care. We appointed appellate counsel on her behalf, as is our practice. Counsel could not find an arguable issue to raise and filed a brief pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835 (*Phoenix H.*). Although we granted mother time to personally file a letter brief to raise an arguable issue, she did not respond. Meanwhile, the agency filed its motion to declare mother a vexatious litigant.

In the approximate four years preceding the filing of the pending appeal, mother in propria persona filed 15 final and unsuccessful appeals and writ proceedings, as summarized below.

1. Mother appealed the juvenile court's January 2008 jurisdictional findings and dispositional order removing the children from her custody. Her court-appointed appellate counsel challenged the sufficiency of the evidence to support the jurisdictional findings and removal order. This court affirmed. (*In re T.S. et al.* (Dec. 12, 2008, F055105) [nonpub. opn.].)
2. Mother appealed orders made at an April 2008 90-day review hearing. Her court-appointed appellate counsel could not find an arguable issue to raise and filed a brief pursuant to *In re Sade C.* (1996) 13 Cal.4th 952 (*Sade C.*).

Although we granted mother time to personally file a letter brief to raise a claim of error, mother did not respond. This court in turn dismissed the appeal. (*In re Alyssa S. et al.* (Sept. 16, 2008, F055614) [dismissal order].)

3. Mother appealed July 2008 six-month review findings and orders. Her court-appointed appellate counsel could not find an arguable issue to raise and filed a brief pursuant to *Sade C.* Although we granted mother time to personally file a letter brief to raise a claim of error, mother did not respond. This court dismissed the appeal. (*In re A.S. et al.* (Feb. 3, 2009, F056166) [dismissal order].)
4. Mother filed a notice of intent in March 2009 to file a writ petition from a setting order pursuant to Welfare and Institutions Code section 366.26, subdivision (*l*). We determined the notice of intent was premature in that the juvenile court had not yet issued a setting order and dismissed the matter. (*B.H. v. Superior Court* (Apr. 3, 2009, F057316) [dismissal order].)
5. Mother filed a notice of intent in June 2009 to file a writ petition from the May 2009 setting order (Welf. & Inst. Code, § 366.26, subd. (*l*)).[2] She thereafter filed a writ petition challenging the order continuing the children's out-of-home placement and terminating reunification services. We denied her petition in an unpublished opinion. (*B.H. v. Superior Court* (Aug. 11, 2009, F057764) [nonpub. opn.].)
6. Mother later filed a notice of appeal from the same May 2009 setting order, referenced in item 5 above. We dismissed the appeal because it was taken

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[2] Such a notice is intended for use after a court has set a Welfare and Institutions Code section 366.26 hearing to select and implement a permanent plan for dependent children. (Cal. Rules of Court, rule 8.450.)

from a nonappealable order. (*In re A.H. et al.* (Aug. 5, 2009, F058177) [dismissal order].)[3]

7. Mother filed a notice of intent to file a writ petition from hearings conducted in September and October 2009. We determined the notice of intent was improper as the juvenile court did not issue a setting order (Cal. Rules of Court, rule 8.450) during that time frame and dismissed the matter. (*B.H. v. Superior Court* (Nov. 12, 2009, F058815) [dismissal order].)
8. Mother filed a notice of appeal from the October 2009 order suspending her rights to make any medical/dental, mental health and educational decisions for the children. Her court-appointed appellate counsel could not find an arguable issue to raise and filed a brief pursuant to *Phoenix H.* Although we granted mother time to personally file a letter brief to raise an arguable issue, mother did not respond. This court in turn dismissed the appeal. (*In re A.H. et al.* (Apr. 1, 2010, F058982) [dismissal order].)
9. Mother filed a notice of appeal from a March 2010 order summarily denying a request she made under Welfare and Institutions Code section 388 to modify the court's prior orders. Her court-appointed appellate counsel could not find an arguable issue to raise and filed a brief pursuant to *Phoenix H.* This time mother did submit a letter brief. However, she failed to make a good cause showing of any arguable issue. We dismissed the appeal in an unpublished opinion. (*In re A.S. et al.* (Jul. 23, 2010, F060006) [nonpub. opn.].)
10. Mother filed a notice of appeal from what we construed to be a November 2009 post-permanency planning review order in Alyssa's dependency. Mother's court-appointed appellate counsel could not find an arguable issue to raise and filed a brief pursuant to *Phoenix H.* Mother did submit a letter brief.

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[3] Alyssa is known as Alyssa S.H. Sometimes, mother's appeals have been filed with a title of *In re A.H. et al.* instead of *In re Alyssa S. et al.*

However, she failed to make a good cause showing of any arguable issue. We dismissed the appeal in an unpublished opinion. (*In re Alyssa S.* (March 16, 2011, F061571) [nonpub. opn.].)

11. Mother's notice of appeal in case No. F061571 also referenced her son C.H.'s dependency. However, the juvenile court issued a new Welfare and Institutions Code section 366.26 setting order in C.H.'s case at the November 2009 hearing. Because the setting order was reviewable by writ petition (Cal. Rules of Court, rule 8.450), rather than appeal, this court deemed mother's notice of appeal to be a notice of intent to file a writ petition in C.H.'s case. Although mother later filed a petition, it was facially inadequate, and on that basis, this court dismissed the writ proceeding in an unpublished opinion. (*B.H. v. Superior Court* (Mar. 1, 2011, F061662) [nonpub. opn.].)

12. Mother filed a notice of appeal from a March 1, 2011 order continuing the Welfare and Institutions Code section 366.26 hearing for C.H. This court ordered briefing on the appealability of the continuance order in light of the fact that mother and her attorney agreed to the continuance. When mother did not file a response within the time provided, this court dismissed the appeal. (*In re A.S. et al.* (May 23, 2011, F062153) [dismissal order].)

13. Mother filed a notice of appeal citing April 5 and 6, 2011 hearing dates. Her court-appointed counsel could not find an arguable issue to raise and filed a brief pursuant to *Phoenix H.* Although we granted mother time to personally file a letter brief to raise an arguable issue, mother did not respond. This court dismissed the appeal. (*In re A.S. et al.* (Jul. 29, 2011, F062360) [dismissal order].)

14. Mother filed two notices of intent to file a writ petition citing the April 2011 hearing dates, mentioned in her previous notice of appeal, as well as additional dates. On our own motion, we treated the notices of intent collectively as a

notice of appeal and consolidated it with the appeal in *In re A.S. et al.*, F062360, referenced in item No. 13 above. As previously mentioned, this court dismissed that appeal when appellate counsel could not find an arguable issue to raise and mother did not respond to our order granting her leave to file a letter brief. (*In re A.S. et al.* (Jul. 29, 2011, F062360) [dismissal order].)

15. Mother later filed yet another notice of appeal from the findings and orders subject to our review in *In re A.S. et al.* (F062360). This court gave mother the opportunity to file a letter brief explaining why her latest notice of appeal should not be dismissed. When mother did not respond, this court dismissed the appeal as duplicative of her appeal in F062360. (*In re A.S. et al.* (Aug. 10, 2011, F062815) [dismissal order].)

We have taken judicial notice of our records (Evid. Code, § 452, subd. (d)) that reveal in the months since the vexatious litigant issue arose in this appeal, mother in propria persona has filed three additional notices of appeal and one notice of intent. Each of these suffers from a procedural infirmity and has either been dismissed as improvidently filed or is awaiting a letter brief from mother explaining why the matter should not be dismissed as non-reviewable. (F064573, *B.H. v. Superior Court*; F064752, *In re A.S. et al.*; F064964, *In re A.S. et al.*; F065118, *In re A.S. et al.*)

We have given mother and her court-appointed appellate counsel in this matter notice of as well as the opportunity to brief, produce evidence, and be heard in oral argument on the question of vexatious litigant status. (*In re R.H.* (2009) 170 Cal.App.4th 678, 687 (*R.H.*).) Mother did not produce any evidence in response. Her court-appointed appellate counsel has filed written opposition, but has waived the opportunity to be heard in oral argument.

DISCUSSION

In *R.H.*, this court held a parent of a dependent child met the definition of a vexatious litigant under section 391, subdivision (b)(1), in that the parent was a person

who in propria persona had commenced, during the seven years preceding the filing of his current appeal, well in excess of five appeals and writ proceedings, all of which had been finally determined adversely to him. (*R.H., supra,* 170 Cal.App.4th at p. 693.) The "untold hours this court ha[d] expended in response to [parent's] voluminous as well as meritless appeals and writs, not to mention the costs of record preparation and court-appointed appellant counsel" led us to our conclusion. (*Id.* at p. 683.) We further determined that the parent would be subject to a prefiling order for future litigation, pursuant to section 391.7, other than an appeal from a criminal conviction or a petition for writ of habeas corpus. (*Ibid.*)

We reasoned, in part, that application of the vexatious litigant law to a parent who abuses the appellate process, is not inconsistent with our state's body of dependency law. Dependency proceedings are part of a comprehensive statutory scheme geared toward expediency, largely to serve the dependent child's best interests. (*R.H., supra,* 170 Cal.App.4th at p. 697.) Mother recognizes our holding in *R.H.* but contends the situation in *R.H.* is distinguishable from her own.

She first observes that in the seven plus years that the parent in *R.H.* filed his numerous appeals and writ petitions, his child's dependency case had been in that stage where the child's interests, in stability and permanency, outweighed the parent's interests in the child's custody and control. (*R.H., supra,* 170 Cal.App.4th at p. 697.) The parent's appeals and writ petitions were not brought from the juvenile court's disposition or while the child's case was in the reunification stage. This court in *R.H.* acknowledged the child and parent share an interest in reuniting up through that point in the proceedings. (*Ibid.*)

Mother points out that she filed several of her notices of appeal and notices of intent while she and the children shared an interest in reunification. She adds those appeals and writ proceeding should not be included in our section 391, subdivision (b)(1) calculation. We agree and specifically exclude from our analysis mother's first three appeals (*In re T.S. et al.*, F055105; *In re Alyssa S. et al.*, F055614; *In re A.S. et al.*,

F056166) and first two writ proceedings (*B.H. v. Superior Court*, F057316; *B.H. v. Superior Court*, F057764).

However, that leaves 10 subsequent appeals and writ proceedings that mother in propria persona initiated and in which she did not prevail prior to her pending appeal. Mother urges us to disregard virtually all of these. She relies on the fact that the appeals in *R.H.* focused on the parent's self-interest as a litigant, not his interests as a parent or the child's interest. (*R.H., supra,* 170 Cal.App.4th at p. 698.) While that is factually accurate, mother too narrowly interprets our *R.H.* decision. She overlooks our analysis that "[t]he hallmark of [the parent's] appeals and writ petitions over the last seven years has been his obsessive attempts at groundless claims which have the effect of clogging the appellate system." (*Ibid.*) The same can be said of mother's 10 subsequent notices of appeal and notices of intent to file a writ prior to her current appeal. Each has been essentially frivolous. Not one of them has led to even an arguable issue of judicial error.

Furthermore, as we explained in *R.H.*, once reunification efforts have ceased, the state has a compelling interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. (*R.H., supra*, 170 Cal.App.4th at p. 697, citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) The state's interest requires the court to concentrate its efforts, once reunification services have been terminated, on the child's placement and well-being, rather than on a parent's challenge to a custody order. (*Ibid*.) Also, protracted litigation over the custody of a child may harm the child, not to mention that there exists a legitimate fiscal and administrative interest in reducing the cost and the burden of dependency proceedings. (*R.H., supra,* 170 Cal.App.4th at p. 698.) All of these concerns apply with equal force here.

Mother also argues that because she was not represented by counsel starting in April 2011, she did not have the benefit of consulting with any trial counsel or having trial counsel, as the parent in *R.H.* did, to initiate an appeal or writ proceeding on her

behalf. (*R.H., supra*, 170 Cal.App.4th at p. 700.) Mother assumes that from April 2011 forward we should not consider her appeals and writs in our vexatious litigant analysis. We disagree. Mother ignores the fact that it was she who elected to retain counsel and thereafter apparently did not pay his fees. Once the court granted her retained counsel's request to withdraw, mother could have asked the court to appoint her another attorney or she could have attempted to retain another attorney. However, mother has apparently refrained from doing either. In other words, this is a problem of mother's making. It does not excuse her numerous appellate filings in propria persona.

Pursuant to *R.H., supra*, 170 Cal.App.4th 678, we conclude mother is a vexatious litigant within the meaning of section 391, subdivision (b)(1).

DISPOSITION

This court finds that Barbara H. is a vexatious litigant within the meaning of section 391, subdivision (b)(1). The clerk/administrator of this court is directed to provide a copy of this opinion and our prefiling order to the Judicial Council. (§ 391.7, subd. (e).) Copies shall also be mailed to the presiding judge and the clerk of the Tulare County Superior Court. This appeal is otherwise dismissed as abandoned.

Henceforth, pursuant to section 391.7, Barbara H. may not file "any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." (§ 391.7, subd. (a).) Disobedience of this order may be punished as a contempt of court. (*Ibid*.) Further, the presiding judge shall permit the filing of such litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. (§ 391.7, subd. (b).)

In the future, if Barbara H. in propria persona attempts to file a notice of appeal or writ petition with this court, the permission she must seek for leave to file an appeal or writ petition is that of this court's presiding justice. In the case of a notice of appeal submitted by Barbara H. in propria persona for possible review by this court, we direct

that the clerk of the superior court shall mark it "received" and forward it to this court, along with a copy of the order referenced in the notice of appeal. Thereafter, the court clerk/administrator of this court shall receive but not file the notice of appeal until Barbara H. in propria persona receives a prefiling order from this court's presiding justice. Similarly, if she in propria persona submits a writ petition to this court, the court clerk/administrator of this court shall receive but not file the writ petition until Barbara H. in propria persona receives a prefiling order from this court's presiding justice.